State of the Judiciary
Chief Justice Julius B. Ness, South Carolina Supreme Court
Message to the Legislature
February 25, 1987, in Columbia, South Carolina

Chief Justice Ness:

Lt. Governor Theodore, Speaker Sheheen, distinguished members of the Legislature, ladies and gentlemen:

Let me thank you, first of all, for the invitation to address you today. As you know, this is the second year I have been asked to discuss with you the state of the South Carolina Judiciary. Last year when the invitation came, I suspected you were only being cordial to a brand-new Chief Justice.

Now, however, the 'newness' is gone. And yet, you have invited me back. I feel such a sense of accomplishment in that.

I sincerely believe the barriers between the Legislature and the Judiciary which you and Bruce Littlejohn dismantled are truly gone. On behalf of the Judiciary, I want to thank each of you for allowing us to work with you for the best interest of the people of South Carolina.

Before I move on to discuss with you the state of the Judiciary, let me share some news. Not quite three months ago, near midnight, most of the members of our Supreme Court gathered in a waiting room at Providence Hospital as a man we all love suffered the effects of a heart attack. Our prayers -- and yours -- have been answered. Dave Harwell has made an excellent recovery, and I am pleased to tell you that he will return to work on the court for the next term. On behalf of the court, I want to thank retired Chief Justice C. Bruce Littlejohn, Circuit Court Judge Rodney A. Peeples, and Circuit Court Judge Lawrence E. Richter, Jr. for their invaluable assistance to the court during Justice Harwell's convalescence.

I want to share with you another piece of good news. I announced this a couple of weeks ago at the annual meeting of the Bar in Charleston, but I want to officially inform you about the tremendous progress we have made in reducing the appellate backlog.

When I became Chief Justice a year and a half ago, we were faced with a staggering backlog. Today, we have about 130 cases with all briefs filed waiting to be heard. Last month, when the Court of Appeals asked for forty cases for hearing, we had to search to find some -- and then we could only send them thirty-eight. The others were in the process of being screened or were the type of cases that, by statute, can only be heard by the Supreme Court. The average case can be submitted to the Court for review within three months after all briefs are filed. I am pleased to tell you that the appellate backlog is gone.

That tremendous feat has been accomplished in a couple of ways. As I told you last year, the Court of Appeals is largely responsible for the great progress we have made. Since its creation

three and a half years ago, the Court of Appeals has rendered decisions in 1,061 cases. Of those, more than ninety-five percent have been the final decisions in those cases. The Supreme Court has granted discretionary review in approximately four percent of the cases decided by the Court of Appeals.

In addition, the increased staff members you provided to us two years ago have rendered great assistance in screening cases in the Supreme Court. We have been able to hold more court and review more cases per month than ever before. And, as you know, this has been possible without any cost to the State. Your decision two years ago to increase the filing fee for appeals has provided the funds for these additional temporary positions.

Similarly, the case load at the trial levels -- Circuit Court and Family Courts -- is, in most counties exactly where it should be. In nearly all counties a case in Circuit Court can be tried within six months after filing. In General Sessions, it is rare for a case to be more than six months old. I require a report the first of each month from every solicitor to see that his docket is current. The lawyers and Judges throughout the State have responded very well to our efforts to streamline the system in favor of the litigants. With rare exception, the trial dockets are admirably under control.

In recent weeks, we have reviewed and assessed our needs, to make an effective allocation of resources to handle appeals in the future. In order to prevent another backlog from developing, the two appellate courts must handle approximately 900 cases every year. Based on workload capacity of the eleven appellate judges, we think that can be done. It won't be easy -- certainly none of us will be under-employed -- but it can be done. I pledge to you that each of us in the Judicial Department will give our utmost to see that the status of the trial and appellate dockets remain current.

I recently met with the Ways & Means subcommittee to discuss the appropriation for the Judicial Department for the fiscal year beginning July 1st. In reviewing facts and figures, I came upon some numbers that are staggering to me. The Judicial Department -- one of three branches of state government -- has an annual budget which is less than four-tenths of one percent of the annual state budget. We have approximately 400 employees in the entire department -- that includes all judges, court reporters, etc. That is about eight people for each county in the state. Yet, the Judicial Department processes at the trial level (Circuit and Family Courts) approximately 160,000 cases per year, and at the appellate level, approximately 1, 000.

For comparison only, I point out that the Judicial Department in the state of Alabama operates on 2.3 percent of that state's annual appropriation, whereas South Carolina's budget is less than one-half of one percent of our annual budget. I ask that in reviewing our budget request for next year, you focus on what a bargain our Judicial Department really is. Keep in mind, too, the special dilemma facing the courts of our state. In spite of fiscal restrictions, the Courts are under a Constitutional mandate to resolve disputes, provide legal remedies, and render Justice. We must handle all work which is legitimately brought before us. We provide only constitutionally mandated services, and we do so on a shoestring. We finally purchased a stapler and tape dispenser for my desk about six months ago. I ask that you review our budget request with a realization that it contains very little flexibility, and no 'fat' at all.

This year, 1987, is the 200th anniversary of the Constitution of the United States. The history of our government can be traced much further than that, however. Seven hundred and seventy-one years ago, King John of England was persuaded to grant to the English people a contract of duties and responsibilities between King and citizen. The Magna Carta contained clauses designed to bring about reforms in judicial and local administration. Centuries later, in 18th century America, the fundamental rights expressed by the Magna Carta were echoed in the Constitutional guarantees our ancestors reserved unto themselves. As Legislators and Judges in 20th century America, still working to define and expand on the legal system which evolved from the wisdom of King John, we would do well to study the historical perspectives of our Anglo-American system of law before undertaking sweeping changes to our system of jurisprudence.

The Magna Carta declared that no property could be seized from a man 'without legal judgment of his peers'. With that important right was born the Anglo-American justice system's guarantee of a right to trial by jury. One of the many tyrannies which led to the birth of this nation was the effort to deprive the people of the colonies of their right to trials by a jury of their peers.

The document which became the Constitution of 1787 preserved this right for the citizens of this country. A strong and powerful democracy has grown on the roots of this guarantee.

The fundamental right to a jury trial has been perpetuated in the written instruments that have shaped the governments of the several states. Thomas Jefferson declared the right to a jury trial as 'the only anchor ever yet imagined by man, by which a government can be held to the principles of the Constitution'.

In recent years, however, you have heard conflicting views on the continued efficacy of the jury system. It has been said that the jury system is responsible for the long delays in the judicial process, and that it is an outmoded way of resolving disputes among citizens. The collective wisdom of juries has been attacked, and we are told juries are unpredictable, arbitrary, and even uninformed. You are being urged to restrict the decision-making authority of the jury, to place limits and controls on its fact-finding duty.

I urge you to closely scrutinize any suggestion that the jury system devised to us by King John nearly 800 years ago is becoming too costly, either in terms of dollars or efficiency. You must focus on the total justice system, which has demonstrated through the centuries its adaptability to the modern world. Restrictions on the Jury system may seem only a slight intrusion on the Constitutional guarantees under which our system has thrived. But one you permit any intrusion at all on our system of individual freedoms, which of our precious liberties will be next?

I ask you to consider whether legislative solutions may be found for every perceived wrong. I recall not too many months ago, there was planned legislation to prevent the Carolina-Clemson game from ending in a tie. I suggest to you that legislative answers do not exist for everything that causes dissatisfaction in our lives.

In April of last year, the United States Supreme Court issued an opinion in a death penalty case

(Skipper v. S.C.) that changed existing law and has had a profound effect on death penalty cases in South Carolina. Since that time, virtually every death penalty case that has reached the state Supreme Court for review has necessarily been reversed on the basis of that Federal decision. Each and every time, either our court or the trial judge has been subjected to a barrage of public criticism. Newspaper accounts have vilified the trial judges for their 'errors', and some have gone so far as to call for the resignation of a trial judge.

You have not been isolated from this siege of public dissatisfaction. To my knowledge, at least four pieces of legislation have been introduced which seek to alter the manner in which state judges are elected. This again, in my opinion, is an attempt to cure a perceived 'problem' without reference to its source, or even without consideration of whether a problem exists at all. If it's not broken, don't fix it.

The trial judges in this state -- both Circuit and Family -- are competent, qualified, and dedicated to the people they serve. You have elected each and every one of them. Because of the manner in which you elect them, they are able to exercise the responsibilities of their office without partisan considerations, and to make the decisions justice requires of them, however unpopular the decisions may be.

In an effort to express thoughts that are difficult to articulate, I sometimes turn to baseball, which is, in many ways, analogous to real life. I can't claim credit for this particular observation, for I have borrowed it from a judge from one of the western states who was subjected to great public criticism after making a particularly unpopular decision.

'The role of judges is very much like that of umpires in the game of baseball. Umpires are not players, nor are they fans. They observe the facts of play and apply the rules of the game fairly and evenhandedly when decisions must be made in order for play to continue. The umpires do not create the situations that call for a decision, but they cannot shirk their duty when such situations arise. However close a play may be, however vociferously both teams may argue, however partisan the crowd may be -- however unpopular the umpires' role -- they must follow the rules of the game.'

'When an umpire has called 'strike three', the batter is out, no matter how loudly he, his team or his team's fans may protest. The crowd may yell that the rule should read that a batter gets four strikes. But unless and until the league decides to change the rule to 'four strikes and you're out', the umpire remains duty-bound to enforce the three-strike rule.'

'Were the umpire to do otherwise, there would be no order left to the game. Bats would be used as clubs, rival fans would fight in the stands, rancor would take the field, and baseball would become just a memory.'

'To be sure, there would be some who would defend the umpire's new four-strike rule to the death, but then again, there would be no real umpires left to defend. That is why umpires and judges alike must constantly place principle above popularity and steadfastly discharge their duties in the face of impatience.'

This is not to say that neither judges nor umpires make mistakes in the exercise of their judgment in a particular case. For instance, we now know that the first base umpire in the sixth game of the 1985 World Series made a mistake that had a significant impact on the result of the series. Judges, too, make honest mistakes. The law is not an exact science. My daddy used to tell me that the only person who doesn't make a mistake is the one who doesn't do anything.

I am now in my 30th year of judicial service to this state. I will celebrate my 71st birthday day after tomorrow. In the normal scheme of things, I would announce to you today my plans to retire as Chief Justice upon reaching the age of 72, a year from now.

Recent changes in Federal law, however, may have affected mandatory retirement for South Carolina judges. I am aware of, and intrigued by, the recent Attorney General's opinion that advises the state is prohibited from enforcing mandatory retirement of state Judges.

I attended the Conference of Chief Justices in Oregon a few weeks ago, and the issue was naturally discussed quite a bit. The prevailing view among the Chief Justices of the nation is that mandatory retirement for state judges has been abolished, and any existing state laws to the contrary have been impliedly overruled.

There has been quite a bit of positive reaction to the Federal bill and to the Attorney General's opinion. However, one newspaper editor in South Carolina suggests the inevitable result of the Federal legislation will be unfettered dictatorial reign by Judicial tyrants. I think the author of that editorial is overreacting just a bit. South Carolina judges are subject to re-election by the General Assembly every four, six or ten years, depending on the positions they occupy. I have full confidence in your ability to eliminate an unlikely situation similar to that envisioned by the newspaper editor, at re-election time.

In the abstract, I know the reasons behind the Federal legislation are sound. We know from the examples of statesmen like Marshall Williams, Pat Harris, Strom Thurmond and the late Speaker Emeritus Solomon Blatt how artificial age restrictions really are.

While the newspaper editor is raising unfounded objections to the overruling of mandatory retirement of judges, he has raised some valid concerns as to the office of Chief Justice. Under the South Carolina Constitution, the Chief Justice is the administrative head of the unified judicial system. Should he so choose, a Chief Justice could unilaterally exercise a tremendous amount of control over the operation of the Judicial Department.

During my tenure as Chief Justice, I have not exercised the exclusive power conferred upon the Chief Justice. Every significant decision relating to the Judicial System has been made by the entire Supreme Court. I have burdened the other members of the Court with my decision-making obligations, and they have willingly shared the responsibilities of my office. I have every confidence the members of the present Supreme Court would continue that tradition if elected to the office of Chief Justice.

I personally do not feel any one person should hold the office of Chief Justice for an indefinite period of time. A number of states have established a system of rotation for the office of Chief

Justice. In light of the abolition of mandatory retirement, you may wish to consider a similar system. Under a system of rotation, the Chief Justice, regardless of his age, could serve as Chief Justice no more than, for instance, four or five years. At the expiration of his term as Chief Justice, he could either retire or resume his position on the Court as Associate Justice and you would elect a new Chief Justice. This system would prevent any one person from holding the office of Chief Justice for an unreasonable or extended period of time, and would eliminate entirely the concerns that have been expressed about the recent changes in the law.

I have discussed this proposal with the current members of the Supreme Court, and they are unanimously in favor of it. I have spoken with past and present Chief Justices who have served under a rotation system, and I understand it has many advantages. I share those thoughts with you for whatever use you may make of them.

Since the Federal legislation passed, I have been contacted by lawyers, judges, legislators, and other people who have urged me to stay on as Chief Justice. I have been encouraged by this show of confidence in the job I have done as Chief Justice.

I am not unaware, however, that these sentiments are not unanimous.

When I was sworn in as Chief Justice, an editorial in a local newspaper described me as a 'lightning bolt'. Acknowledging a certain amount of truth in that, I realize a lightning bolt possesses a rather short-term usefulness. Its long-term presence gets on everybody's nerves, and after a while it does more harm than good.

Today, I honestly cannot tell you when I plan to retire. There are still several projects I would like to see completed. Proposed charges to the Family Court rules are pending, and I am anxious to see them finalized and in place. The Court is expecting a report from the Judicial Council in the next several months regarding a pilot project for cameras in the courtrooms of our state. You may not know we are only one of seven states in the nation who do not permit cameras in the courtroom in one fashion or another.

In addition, I plan, in the next few months, to appoint a committee to draft proposed criminal practice rules for General Sessions Courts. These projects, as well as, our continued efforts to reduce delay at the trial and appellate levels, are of great interest to me, and I sincerely want to be involved in each of them.

I assure you that I will advise you no later than November 1, 1987, whether I will retire at 72, or continue in the office of Chief Justice to see some of these projects completed. I must be certain that whatever decision I make is in the best interests of the judicial system of our state.

Before I conclude, I want to thank the four men with whom I work for the many things they do. Each of them -- George Gregory, Dave Harwell, Lee Chandler, and Ernest Finney -- exemplify the many qualities which bring credit to the Judiciary. They are my close and loyal friends. I am blessed to work with men of such wisdom and intellectual courage.

In closing, let me share with you a quote from Plato, written in the year 409 B.C.

[A] judge should not be [a] young [man]; He should have learned to know evil, not from his own soul, but from late and long observation of the nature of evil in others.

Thank you so very much.